

IN THE HIGH COURT OF UTTARANCHAL AT
NAINITAL
WRIT PETITION NO. 579 (MS) OF 2006

1. Ashok Kumar, S/o Sri Ansh Prasad, R/o Upper Bazar, Srinagar, District-Paurigarhwal.
2. Anil Kumar, S/o Sri Ansh Prasad, R/o Upper Bazar, Srinagar, District Paurigarhwal. Petitioners

Versus

1. District Judge, Paurigarhwal.
2. Sambhu Prasad Dhaudiyal, S/o late Daya Krishan Dhaudiyal, R/o Village Bhalgaon, Patti-Kautsyun, District-Paurigarhwal, presently residing at 28, Dangwal Marg, Dehradun.
3. Arun Kumar, S/o late Jagdish Prasad Dhaudiyal, R/o Vilalge Dang Patti, Katusyun, District Paurigarhwal.
4. Arun Kumar, S/o late Jagdish Prasad Dhaudiyal, R/o Vilalge Dang Patti, Katusyun, District Paurigarhwal.
5. Smt. Manoram Dhaudiyal, W/o late Jagdish Prasad Dhaudiyal, R/o Village Dang Patti, Katulsyun, District Paurigarhwal. Respondents.
6. Sri Rajeev Dhaudiyal, S/o late Srikrishna Dhaudiyal, R/o 19, Dangwal, Marg, Dehradun.
7. Smt. Aparna Dhaudiyal, W/o late Srikrishan Dhaudiyal, R/o 19, Dangwal Marg, Dehradun.
8. Satish Chandra, S/o late Daya Krishan Dhaudiyal, R/o Bhurgaon, Phase-II, Panditwari, Dehradun, District-Dehradun. Proforma respondents.

Dated: 19.05.2006

Hon'ble Rajesh Tandon, J.

Heard Sri K.N. Joshi, Advocate for the petitioners, Standing Counsel for the respondents no. 1 and Sri S.K. Posti, Advocate for the respondents no. 2 to 5. At the time of admission of the writ petition, both the parties have

advanced their arguments on merits of the case and therefore, the writ petition is being disposed of finally.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 6th May, 2006 passed by the District Judge in Misc. Civil Appeal No. 6 of 2006 Sambhu Prasad Dhaudiyal and others Vs. Rajiv and others.

Briefly stated, the petitioners have purchased the property from the defendants no. 1 and 2 by a registered sale deed dated 17th March, 2006. However, a suit was filed by the plaintiff/respondents no. 2 to 5 praying for a declaration as well as for cancellation of the sale deed dated 17th March, 2005 to the extent of half share of the plaintiff. Along with the plaint, the plaintiff has also filed an application under Order 39 Rule 1 C.P.C. During that the proceedings of the case, the affidavit has been filed by the respondent no. 6 Rajeev Dhaudiyal. In paragraph 4 of the affidavit, he has stated that they are the owners of their shares and they have sold the property in favour of Ashok Kumar and Anil Kumar (petitioners) and the plaintiff Sambhu Prasad, Anoop Kumar, Arun Kumar and Smt. Manorama Devi have no concern with the property and after the death of Sri Daya Kishan Dhaudiyal, all the four brothers have mutually partitioned the property by way of a family arrangement. The trial Court has rejected the application filed under order 39 Rule 1 and 2 C.P.C. after hearing the parties.

Aggrieved by the said order, the plaintiffs went in appeal. The appellate Court has allowed the appeal and restrained the defendants from making any constructions and has passed the order of status quo at the spot till the Original Suit No. 6 of 2004 is decided. Petitioners have filed the present writ petition against the said order.

Admittedly as will appear from the plaint, that the plaintiffs have claimed only half portion of the property and have also claimed the declaration and cancellation of the sale deed. Further one of the co-sharer has filed the suit for

injunction when in point of fact the petitioners have stepped into the shoes of the other co-sharers who have sold the property in favour of the petitioner. Since the injunction has been claimed and has been granted for the entire portion for which the plaintiffs are not claiming, therefore, the impugned order requires reconsideration.

Counsel for the respondents has referred the case of *Maharwal Khewaji Trust (Regd) V. Baldev Dass* (2004) 8 SCC 488. The same is not applicable in the present case as one of the co-sharers has filed the suit apart from the other co-sharers. Petitioners, however, have stepped into the shoes of their predecessors.

Counsel for the respondents has further referred the judgment of ***State Bank of India Vs. Ghamandi Ram (Dead) through Gurbax Rai, 1969 AIR 1330 SC*** regarding the jointness of the property. The position is not disputed and therefore, on account of jointness as well, there cannot be any injunction apart from the co-sharers.

Counsel for the petitioner has referred the judgment of Division Bench in ***Deepali Bhattacharya Vs. Ramji and others, 1990 R.D. Page 382***, where it has been stated as under:-

“It is now well established that before any court should grant an injunction, it must be satisfied about its experience of the three main ingredients i.e., strong prima facie case in favour of the plaintiff, likelihood of irreparable injury being caused on the refusal of the injunction and existence of balance of convenience in favour of the plaintiff. Should any of these ingredients be absent, the Court will not be justified in granting injunction. Even if it is assumed that the appellant on the basis of allegations, made by her was entitled to a share in the property, yet it was also necessary for her to establish that there was likelihood of any irreparable injury being caused to her and that balance of convenience lay in her favour. The main consideration in this regard would be whether the plaintiff was actually in

possession of the property or not. Admittedly, the plaintiff No. 1 is residing at Kanpur while plaintiff No. 2 (respondent No. 5 here) was admittedly a resident of Allahabad. None of them, therefore, was residing in the property in question. Even if respondents 1 and 2 are not delivered possession over the disputed property, no irreparable injury is likely to be caused.”

In view of the observations made above, the order impugned is set aside, the matter is sent back to the appellate Court for deciding afresh within a period of six weeks from the date of presentation of the certified copy of the order.

Writ petition is allowed. No order as to costs.

(Rajesh Tandon, J.)

19.05.2006

Rathour